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IN THE

Supreme Court of the United States

OCTOBER TERM 1940.

NUMBER 836

ELSIE VAN VRANKEN,
Petitioner,

against

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

LEE MCCANLISS,
Counsel for Petitioner.

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against

GUY T. HELVERING, Commissioner of Internal Revenue,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of ELSIE VAN VRANKEN respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment of that Court, entered in this case on December 18, 1940, and therefore shows as follows:

I.

Summary Statement of the Matter.

(a) **Nature of the suit.**

The petitioner petitioned the United States Board of Tax Appeals for a redetermination of the deficiency in her Federal income tax for the calendar year 1935, which deficiency, in the sum of $8,170.22, was assessed against her by the respondent. The said Board decided that the de-

ficiency amounts to $7,861.92. The petitioner petitioned the United States Circuit Court of Appeals for the Second Circuit to review the decision of the said Board. The order for mandate of the said Court affirms the decision of the said Board.

(b) **Summary of facts.**

John S. Eakins died on August 16, 1915, a resident of Kings County, New York, leaving a will (pp. 35 to 42, inclusive, of the record), which was probated, which gave his residuary estate in trust to pay the income to Amelia A. Eakins, his wife and the mother of the petitioner, for the life of the said Amelia A. Eakins, and upon her death to make certain other dispositions of the trust fund and to pay over the remainder to his daughter, Elsie Van Vranken, who is the petitioner, if she should outlive his wife, or, if she should die during her mother's life, to pay over such remainder to his daughter's issue. The said Amelia A. Eakins died on April 26, 1930.

Included in the estate of the petitioner's father were 50 shares of Union Pacific Railway Company stock, 25 shares of Delaware & Hudson Railway Company stock, and 500 shares of American Gas & Electric Company stock. Those securities were retained in the trust fund held for the benefit of the petitioner's mother. As a part of the petitioner's share of the remainder of the estate of her father, the petitioner received and accepted the said securities in kind after the death of her mother at their then values. The value of the said stocks on August 16, 1915, the date of the testator's death, was $10,930.77. At the death of the petitioner's mother on April 26, 1930, the stocks were worth $89,153.12. In 1935 the petitioner sold the said stocks for $24,394 (p. 34 of the record).

In preparing her income tax return for the year 1935, the petitioner claimed a loss of $64,759.12 on the sale of

the aforementioned securities, and claimed 40% thereof, or $25,903.64, as a loss deduction. The petitioner determined this loss by using the 1930 valuation as the basis.

In computing the deficiency in question, the respondent used as the basis the value of the securities at the date of death of the petitioner's father, on August 16, 1915, with the result that the loss deduction of $25,903.64 was disallowed and a percentage of the gain resulting from the basis adopted by the respondent was added, creating an estimated deficiency of $8,170.22.

As recomputed for the purpose of the final decision of the said Board, the figures presented in a simple manner are as follows:

Net income returned	$20,119.04
The said loss deduction disallowed	25,903.64
30% of gain on the said sales added, computed on the basis of $24,394 received, less value in 1915—$10,930.77, or $13,463.23—30%	4,038.97
Uncontested additions	657.57
Total net income	$50,719.22
Total tax $9,578.99, paid $1,717.07, deficiency	$ 7,861.92

The sum of $29,942.61, the aggregate of the foregoing items of $25,903.64 and $4,038.97, is in controversy.

(c) **Question involved.**

The controversy is whether the petitioner became entitled to a loss deduction or, on the contrary, became taxable upon a principal gain; that is to say, whether the true basis for determining gain or loss is the value of the said stocks at her mother's death in 1930, as maintained by the petitioner, or at her father's death in 1915, as maintained by the respondent.

II.

Reason relied on for the allowance of the writ.

The decision of the Circuit Court of Appeals for the Second Circuit in this case is in direct conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit on the same question in the case of *Richard J. Reynolds, Petitioner,* v. *Commissioner of Internal Revenue, Respondent,* as more fully appears in the opinion rendered in the latter case on October 7, 1940, 114 Fed. (2d) 804. In the *Reynolds* case a writ of certiorari was granted by this Court on February 17, 1941. The precise question is also involved in *Flagler* v. *Commissioner, Archbald* v. *Commissioner,* and *Augustus* v. *Commissioner,* in the first of which cases certiorari has been granted, and in the second and third of which cases, certiorari has been applied for.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that Court to certify and send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in this cause, to the end that the said cause may be reviewed and determined by this Court according to law, and that your petitioner may have such other and further relief as to this Court may seem proper and in conformity with law.

And your petitioner will ever pray.

LEE MCCANLISS
Counsel for Petitioner.

Dated, March 13, 1941.